Nos. 3, 10 and 71

In the Supreme Court of the United States

OCTOBER TERM, 1960

MAURICE E. TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The majority (R. 903–928)[1] and dissenting (R. 928–930) opinions of the Court of Appeals in the main case are reported at 269 F. 2d 928, 946. The prior opinions of the Court of Appeals reversing petitioner's convictions following his first trial are reported at 247 F. 2d 130, 136.

The oral opinion of the District Court (R. (3) 44–52) denying petitioner's first motion for a new trial is not reported. The Court of Appeals affirmed that order without opinion (R. (3) 59).

[1] References to the record in the main case (No. 10) are prefixed "R." or "R. (10)." References to the records in Nos. 3 and 71 will appear as "R. (3)" and "R. (71)", followed by the appropriate page designations.

The oral opinion of the District Court denying petitioner's second motion for a new trial appears at R. (71) 22–26. The Court of Appeals again affirmed without opinion (R. (71) 28).

Also pertinent here is the opinion of the District Court in *United States* v. *West, et al.,* 170 F. Supp. 200, and that of the Court of Appeals for the Sixth Circuit in *West et al.* v. *United States,* 274 F. 2d 885, decided February 15, 1960, petitions for certiorari pending, Nos. 93, 73 Misc. and 74 Misc.

JURISDICTION

The judgments of the Court of Appeals (R. (10) 930, (71) 28, (3) 59) were entered on the following dates: in the main case, August 3, 1959, with petition for rehearing denied on August 21, 1959 (R. 936); on the first motion for a new trial, March 27, 1959; on the second motion for a new trial, March 22, 1960. On September 8, 1959, Mr. Justice Whittaker entered an order extending the time for filing a petition for a writ of certiorari in the main case to and including October 20, 1959 (R. 936), and the petition was filed on October 16, 1959. By order of Mr. Justice Whittaker, dated April 4, 1959, the time for filing a petition for a writ of certiorari on the denial of the first motion for a new trial was extended to May 26, 1959 (R. (3) 60). The petition was filed on May 25, 1959. The petition for certiorari on the denial of the second motion for a new trial was filed on April 18, 1960. The petitions were granted on May 31, 1960 (R. (3) 61, (10) 937, (71) 29; 363 U.S. 801). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the venue of petitioner's trial was properly laid in the United States District Court for the District of Colorado.

2. Whether the so-called "two-witness" rule in perjury cases applies to a prosecution under the "false statements" statute (18 U.S.C. 1001) for filing a false non-Communist affidavit.

3. Whether the evidence is sufficient to support the verdict.

4. Whether inadmissible evidence was received and cross-examination was prejudicially limited.

5. Whether petitioner was prejudicially deprived of any pre-trial statements of government witnesses by the trial court's rulings as to the application of 18 U.S.C. 3500.

6. Whether the trial court's instructions to the jury on the meaning of the terms "membership" and "affiliation" were correct.

7. Whether the trial court abused its discretion in denying petitioner's motions for production of grand jury testimony.

8. Whether the trial court properly denied without a hearing two motions for a new trial based on alleged misrepresentations by a government witness concerning details of his personal history, none of which was directly material to the issues of the trial.

STATUTES AND RULE INVOLVED

18 U.S.C. 1001:

> § 1001. STATEMENTS OR ENTRIES GENERALLY.
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, con-

conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

29 U.S.C. 159(h):[2]

§ 159(h) AFFIDAVITS SHOWING UNION'S OFFICERS FREE FROM COMMUNIST PARTY AFFILIATION OR BELIEF.

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or

[2] Section 9(h) was repealed on September 14, 1959, by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 519. Section 504(a) of the new Act provides that no person who is or has been a member of the Communist Party may hold office in a labor organization or association of employers dealing with a labor organization during or for five years after the termination of his membership in the Communist Party.

teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

18 U.S.C. 3500:

§ 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the

court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

18 U.S.C. 3237:

§ 3237. OFFENSES BEGUN IN ONE DISTRICT AND COMPLETED IN ANOTHER.

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

(b) Notwithstanding subsection (a), where an offense involves use of the mails and is an offense described in section 7201 or 7206 (1), (2), or (5) of the Internal Revenue Code of 1954 (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be

tried in the district in which he was residing at the time the alleged offense was committed: *Provided,* That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

Rule 33, F.R. Crim. P.:

NEW TRIAL

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

Count 1 of a six-count indictment (R. 1–4), returned on October 28, 1954, in the United States District Court for the District of Colorado, charged that petitioner unlawfully, wilfully and knowingly made and used a false "Affidavit of a Non-communist Union Officer" (Form NLRB 1081) executed on December 19, 1951, and that petitioner caused this affidavit declaring he was not a member of the Communist Party to be filed with the National Labor Relations Board, all in violation of 18 U.S.C. 1001.

Count 2 charged a similar violation of 18 U.S.C. 1001, in that the same affidavit was false in stating that he was not affiliated with the Communist Party. Counts 4 and 5 charged that he falsely denied membership and affiliation, respectively, in the Party in a second affidavit, executed December 3, 1952, and thereafter filed with the Board.[3]

Following a trial by jury, petitioner was found guilty on each of these four counts, but on appeal to the Court of Appeals the judgment of conviction was set aside and a new trial ordered because of error by the trial court in permitting cross-examination of petitioner's character witnesses. *Travis* v. *United States*, 247 F. 2d 130 (C.A. 10). Petitioner was thereafter retried on January 13, 1958, and was again convicted on all four counts (R. 25). He was sentenced to four years' imprisonment and a fine of $2,000 on each of counts 1 and 4, the prison terms to run consecutively, and to four years' imprisonment on each of counts 2 and 5, to run concurrently with the terms imposed on counts 1 and 4—a total of eight years' imprisonment and a $4,000 fine (R. 23–24). Petitioner then moved for a new trial or in the alternative for a hearing on the motion for a new trial. The motion was denied by the District Court. See oral opinion, R. (3) 44–52. The Court of Appeals affirmed this action without opinion (R. (3) 59). The judgment of conviction was affirmed by the Court of Appeals, one judge dissenting, on August 3, 1959 (R. (10) 930). A second motion for a new trial was

[3] On motion of the government, counts 3 and 6 of the indictment were dismissed prior to the first trial (R. 15).

denied by the District Court in an unreported opinion (R. (71) 22–26) and was affirmed by the Court of Appeals without opinion (R. (71) 28).

The evidence adduced by the government may be summarized as follows:

THE FILING OF THE AFFIDAVITS

At the trial, it was stipulated by petitioner's counsel that both affidavits were executed by petitioner, as an officer of the International Union of Mine, Mill & Smelter Workers ("Mine-Mill"), were mailed in Denver, Colorado, and were received by and filed with the National Labor Relations Board in Washington, D.C. It was further stipulated that the making and filing of the affidavits is a matter within the jurisdiction of an agency of the United States Government, *viz.*, the National Labor Relations Board, and that, during the life of the affidavits, the Mine-Mill Union was in compliance with subsections (f), (g), and (h) of Section 9 of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159 (f), (g), and (h)) (R. 27–30, 31–38; Exs. 1–6, R. 884–889).

THE FALSITY OF THE AFFIDAVITS

The evidence adduced by the government to prove that petitioner, from a time antedating the execution of the first of the two affidavits here involved (December 19, 1951) to and beyond the date of the execution and transmittal of his second affidavit (December 3, 1952), was at all times a member of the Communist Party may be summarized as follows:

A. EVIDENCE ANTEDATING THE FIRST AFFIDAVIT (OF DECEMBER 19, 1951)

1. Petitioner's membership in the Communist Party dates back at least to 1942, when he held the position of Party co-ordinator for Mine-Mill in northern California (R. 41–42). From 1942 to 1944, his Communist Party assignment was to carry on Party work inside the Mine-Mill Union in northern California (R. 43). His participation in the Party's work inside Mine-Mill is illustrated by an incident in 1942, when he informed government witness Kenneth Eckert,* a fellow Mine-Mill official and Party member (R. 34, 41, 42), that Allan McNeal, then the Administrative Assistant to the President of Mine-Mill, was the ranking Communist Party official inside the Union and that he (Eckert) should treat instructions from McNeal concerning Party work in the Union as authoritative Party instructions (R. 44–45). Petitioner thereafter steadily progressed to positions of prominence and leadership within Mine-Mill, becoming Assistant to the President in 1946, Vice President in 1947, and President later in that year. Since 1948, he has been Secretary-Treasurer of the International Union (R. 455–456).

In 1946, petitioner became a member of a group known as the "Steering Committee" (R. 47). The Steering Committee was not an official organization

*Eckert was a member of the Communist Party from 1931 to 1948, except for two relatively short periods while he was abroad and a member of the armed services (R. 34). He attended Party schools at Toledo and Camp Robinhood, Ohio, and in Moscow, U.S.S.R. (R. 40).

of Mine-Mill, but a committee of Mine-Mill leaders who were members of the Communist Party and designated by the Party to coordinate Party activities within the Union (R. 47). Immediately preceding the formation of the Steering Committee, the Executive Board of Mine-Mill was equally divided between Communists and anti-Communists so that the Party was unable to control the Union effectively (R. 53–54). At the organizational meeting of the Steering Committee—held in Chicago in 1946 (R. 47) and attended by such prominent Party leaders as John Williamson, National Trade Union Secretary, Gil Green, Illinois State Secretary, and Fred Fine, Illinois Trade Union Secretary—petitioner stressed the importance of establishing a committee of Communists inside Mine-Mill for the purpose of facilitating and coordinating the Party's work within the Union (R. 48–49).

In the years following its organization, the Steering Committee met "very frequently" (R. 49) and was usually presided over by petitioner, John Williamson, or Gil Green, "or some other ranking Communist official" (R. 51). At one of these meetings, held just prior to a Mine-Mill International Executive Board meeting in the early part of 1946 (R. 55), petitioner pointed out that since the Party now had a majority on the Executive Board it was necessary to reverse some of the actions which the anti-Communist faction on the Board had taken at an earlier meeting (R. 57). The proposals suggested by petitioner were subsequently adopted by the Union's Executive Board (R. 60–61).

A few months later, in the spring of 1946, the Steering Committee called a mass meeting which was held in Chicago and attended by about 75 persons who were members of both the Communist Party and the Mine-Mill. Petitioner, who presided over this meeting, stated that it had been called to bring together a considerable number of Communist Party members in Mine-Mill and to acquaint them with the "changed situation" in the Union and the efforts being made to increase the Party's role therein. He submitted for their approval a ten-point program, which was adopted at the meeting and thereafter submitted to the Union's Executive Board and the International Convention of Mine-Mill held in Cleveland later in the same year (R. 61-63).

In the fall of 1946, just prior to Mine-Mill's annual convention, the Steering Committee met with John Williamson, the Party's national trade union secretary, in Cleveland, to map out the Party's strategy in selecting and supporting candidates for international office in Mine-Mill. Petitioner stated that he agreed with Williamson that the Party should support a candidate for Secretary-Treasurer who (though he was not a Communist) could be counted on by the Party to refrain from supporting the attempt of the non-Communist faction to remove the then President and other officers (R. 64–65). This strategy was substantially carried out at the convention (R. 65).

The practice of holding strategy meetings in order to consolidate action by Party members inside Mine-Mill and to further Party objectives continued

through 1947, when the Steering Committee convened on a number of occasions prior to and during the Mine-Mill convention held in St. Paul that year (R. 66–68). At one of these meetings attended only by Party members (held at the Chicago home of Henry Horowitz, a Party member who was an associate editor of the Union paper), petitioner and Gil Green, Illinois Communist Party Secretary, agreed that, because of opposition from the CIO to petitioner and other Communist officers of Mine-Mill, petitioner should not become a candidate for the office of President. The Committee decided to support the candidacy of Jack Clark, a non-Communist who could be relied on not to oppose the Communists in the Union, for the office of President and petitioner for Secretary-Treasurer (R. 68–69, 70–72).

2. In June 1947, Congress passed the Labor Management Relations Act, 1947 (61 Stat. 136), which, among other things, amended the National Labor Relations Act so as to restrict the enjoyment of significant statutory rights to labor unions whose officers filed with the National Labor Relations Board affidavits attesting that they were not members of, or affiliated with, the Communist Party (Sec. 9(h), *supra*, pp. 4–5).

In February 1948, a large group of leading Party members who held offices in labor unions, including petitioner, met in New York City for the purpose of formulating a Party policy with respect to the affidavit requirement of the new Act. Present at the meeting were such prominent national leaders of the Communist Party as William Z. Foster, its National

Chairman, Eugene Dennis, its General Secretary, and John Williamson, its National Trade Union Secretary. After an extended discussion, it was decided that the Party policy should be not to sign the non-Communist affidavits (R. 83–89). Shortly after the meeting, petitioner told Eckert, who had also been present, that they would "just have to live with" the Party's decision (R. 88–89).

At a formal meeting at his home in Chicago a few weeks later, petitioner related the Party policy to a group of Communist Mine-Mill officers and told them that they would have to abide by it (R. 89–90). Gil Green, who was present at this meeting, suggested that Communist-dominated unions could avoid the effects of not being entitled to have their names placed on the ballot in Labor Board elections because their officers had not complied with the affidavit provisions of the Act by asking the people involved (in the unions) to mark the ballot "No" (R. 90–91). Petitioner then asked Green whether the policy of Lenin as expressed in a booklet called "Left-Wing Communism" was applicable to the present situation. Green replied that it was. Lenin, in this booklet, stresses the necessity for Communists to work inside trade unions and to remain in them at all costs, no matter what trick or artifice must be employed by them in order to do so (R. 91). Green also explained that the law did not require the affiant to swear that he had not been a member of the Party prior to, or that he would not become a member after, the date of the signing of the affidavit, and suggested that Communist labor leaders should organize and

belong to a "Thursday afternoon social club" to circumvent the law (R. 91–92).

In accordance with the Party position, the Executive Board of Mine-Mill decided not to comply with the non-Communist affidavit provision of the new law (R. 457–459; R. 99–100). By June 1949, however, petitioner told government witness William Mason that the Executive Board of the Union would soon be acting on its non-compliance policy because Mine-Mill had been losing elections as a result of the fact that its name could not appear on the ballot, and, furthermore, that there had been "discussions going on within the Party on this whole deal" (R. 461–462). Shortly thereafter, in July 1949, the Executive Board passed a resolution changing its previous position and stating that the Union would thereafter comply (R. 460–461).

3. Several days following this action by the Executive Board, in July 1949, petitioner told Mason that the Union's policy change would not mean that he would have to quit his Union office, but that it would mean he would have to "resign from the Party" (R. 463–464). He handed Mason a typewritten statement which he said was his "resignation statement" (*ibid.*). This statement, he said, " had been cleared with Ben Gold"[5] and other "Party" people in New York and was shortly to be published in the Union

[5] Gold was one of the Party leaders who attended the 1948 strategy meeting in New York (R. 83–85). He was at that time a member of the Party's "Central" or National Committee (R. 84–85).

paper (*ibid.*). Mason[6] asked petitioner whether this would be the policy pursued by Communists in other unions and was told by petitioner that the Party thought it the best policy for Communists in unions to follow (R. 464).

The August 15, 1949, issue of the Union paper contained an article by petitioner announcing that he had "resigned from the Communist Party" "in order to make it possible for me to sign the Taft-Hartley affidavit" (G. Ex. 8; R. 890). The exact date of the "resignation" does not appear from the record, nor does the record contain any document purporting to constitute the resignation.[7]

B. POST-"RESIGNATION" EVIDENCE

In the fall of 1951, on the occasion of petitioner's first meeting with government witness Fred Gardner,[8] petitioner admitted his continued membership in the Communist Party. Petitioner told Gardner that he (Gardner) had come to Mine-Mill with "excel-

[6] Mason was a Walking Delegate for the Butte Mines Union No. 1 of the International Union of Mine, Mill & Smelter Workers in 1936 and 1937. In 1939 and 1940, he was Financial Secretary of the Union; in 1944, President of the Union. He was Executive Board member for District No. 1 of the International Union in 1941 and 1942 and from 1945–1953 inclusive (R. 452–454). Mason was a member of the Communist Party for a brief period in the early 1930's (R. 455).

[7] Witness Eckert testified that, based upon his experience in the Communist Party from 1931 to 1948, "the policy of the Party" was that "once having joined the Communist Party you could not leave without being expelled" (R. 117–118).

[8] Gardner was a member of the Communist Party from 1933 to 1955 (R. 437). From 1951 to 1955, he was employed as an International Representative of the International Union of Mine, Mill & Smelter Workers (*ibid.*).

lent recommendations" from "the Communist Party of Cleveland" (R. 442–443). Petitioner related to Gardner that he (petitioner) had had difficulty in crossing the border into Canada because of his "membership in the Party" and "public resignation" therefrom (R. 443). He confided to Gardner that his formal resignation from the Party in 1949 was not an actual resignation and termed it a "mistake" because it had provided the "enemies of the Party" with an opportunity to point out that it was not a "true" resignation (R. 443–445).

In March 1952,* the Communist labor union leaders delegated to petitioner the assignment of communicating with one Salon, a leader of the World Federation of Labor Unions, in Paris. The Soviet delegation to this organization, meeting in Paris, was attempting to force the "American left-wing" unions to form a "third federation." The decision whether to do this had been delegated by the American Communist Party to the unions themselves. After discussing the problem, the officers of the "left-wing unions" decided that they were not in favor of such a move and assigned to petitioner the task of relating this decision to the World Federation of Labor Unions (R. 465–468).

In March 1953, a staff conference of Mine-Mill was held in Denver, Colorado (R. 469–470). The proposed agenda for this conference contained a "legislative program" which listed a number of items such as "repeal of the McCarran Act" and "the fight

* This date falls between the execution of the first (December 19, 1951) and the second (December 3, 1952) affidavits filed by petitioner.

against witch-hunting." When Mason called petitioner's attention to the fact that the Union's legislative program listed no matters pertaining to the betterment of working conditions, petitioner admitted the error and directed the insertion of additional matters in the program (R. 470–471). He told Mason, however, that "these other things too like repeal of the McCarran Act are important" because "[w]hen they get us Communists they will be after people like you if we don't get these laws repealed" (R. 471–472).

In June 1953, witness Gardner was transferred by Mine-Mill to a new assignment in the Coeur d'Alene Mining District of Idaho. Petitioner instructed him to stop off in Denver on his way to Idaho for a "briefing." (R. 445–446). At a meeting in petitioner's home in Denver, petitioner related to Gardner the particulars of a factional dispute between Mine-Mill Party members in the Coeur d'Alene area and warned him that for this reason he should "remain aloof" from any Party activity until further notified. He told Gardner that he felt certain that the dispute would be resolved by the expulsion of certain persons from the Party and that Gardner could reactivate himself in the Party upon being contacted by someone whom petitioner would identify to him beforehand (R. 446–448).

In a conversation with petitioner in August 1953, at Butte, Montana (R. 476–477), witness Mason accused petitioner and his Party-member subordinates in the Union of trying to undermine the leadership of the Union's District No. 1 in the midst of a bargaining conflict with employers in that area, because the Dis-

trict No. 1 leadership was opposed to Communist domination of Mine-Mill. Mason stated that he recognized that petitioner was the leader of the Party in the Union and was talking to him in that capacity, warning him that the Party's tactics had made some of the Union's leadership in Montana angry. Petitioner did not deny these accusations, but apologized to Mason and told him that he had pursued this policy because he had been misinformed by Clark, the Union's President. At one point in the conversation, petitioner offered to resign his office as Secretary-Treasurer and at another he asked Mason to come to Denver to discuss these difficulties with him and other Communist Party members in the Union (R. 477–479).

In a sequel to this conversation, which took place in Denver (R. 481–483), Mason reverted to the matters discussed in Butte and stated that conditions within the Union caused by Communist domination, such as the policy of the Union paper of constantly criticizing the foreign policy of the United States, should be changed to conform to the thinking, aims and aspirations of the rank and file membership. Petitioner advised Mason that the position the latter had outlined was "in direct opposition to the Party" and that his suggestion that the policy of the paper be changed was not "realistic." He went on to state that the Party leadership in the Union, including himself, felt that there should be "no compromises" because there had been "too many compromises already." He noted that "the Soviet Union is becoming stronger," and that this was true also of the "po-

sition of the Communist[s] in the Union," who, along with other Communists, had been able to "repulse the raid and hold this union and other unions" (R. 483–484). When Mason threatened an open fight on the Communist issue, petitioner pointed out that he would have the machine and the paper to use against Mason in such a fight. He concluded the conversation by telling Mason that he (Mason) had been "invited to get into the Party" and that "had [he] done so" he "would be sitting high in the councils of this organization with us" (R. 484–485).

THE CHARGE TO THE JURY

On the meaning of membership, the trial court charged that "there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member." The judge also told the jury that in determining this question they were permitted to take into consideration eleven factors which he enumerated for them (R. 870–872).[10]

With respect to affiliation, he charged the jury (R. 873):

> "Affiliation" as used in the second and fifth counts of the indictment is not the same as membership. The word "affiliated", as used in the second and fifth counts of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

[10] The eleven factors were taken from the Communist Control Act of 1954, but the judge merely stated the factors without mentioning that Act.

A person may be found to be "affiliated" with an organization even though not a member, where there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis.

"Affiliation" includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving a reasonable cause for the charge of a breach of good faith.

Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you, ladies and gentlemen, are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.

On the issue of knowledge and intent, the trial judge charged the jury as follows (R. 870–871):

The acts charged in the indictment are alleged to have been done "knowingly" and "wilfully". The word "knowingly" means to act voluntarily and purposely and not because of a mistake or inadvertence or other innocent reason. The word "wilfully" means to act voluntarily and purposely and with the intent to do that which the law forbids.

* * * * *

> Intent is a state of mind and can only be determined by what an individual says and what he does. * * *

He further charged (R. 875) that the government had the burden of proving intent beyond a reasonable doubt, and that the intent required to be proved was a specific intent as distinguished from a mere general intent.

THE FIRST MOTION FOR A NEW TRIAL

At petitioner's trial, Fred Gardner (whose testimony provides the basis for both motions for a new trial) testified on direct examination concerning two conversations he had had with petitioner in 1951 and 1953 (*supra*, pp. 17–19). The significance of Gardner's testimony to the trial issues was that it tended to prove that petitioner's pre-1949 membership in the Party—which was undisputed—was not terminated at the time of his announcement in 1949 that he had "resigned", but continued beyond that time to and beyond the dates of both the affidavits in issue. One of the two other government witnesses (Mason) similarly testified to conversations with petitioner which tended to prove that petitioner was still a member of the Party in 1952 and 1953—between and after the affidavit dates (*supra*, pp. 19–21). No evidence was offered by petitioner contradicting the government's proof that he was a Party member at the time he signed the two affidavits (R. (3) 29–30).

A few days before Gardner testified in petitioner's case, he had appeared as a government witness in *United States* v. *West, et al.*, a prosecution in the United States District Court for the Northern Dis-

trict of Ohio, for conspiracy to file false non-Communist affidavits in violation of 18 U.S.C. 371 (R. (3) 2). Gardner's testimony on direct examination in the *West* case concerned experiences he had had in the Communist Party involving the defendants in that case. On cross-examination in the *West* case, Gardner was asked whether he had ever been in the Armed Forces and he answered "No." (R. (3) 30–31). As a result of information received by one of the attorneys for the defense in the *West* case, indicating that this testimony by Gardner concerning his military history was untruthful or inaccurate, those attorneys communicated with the Department of Justice requesting that it investigate the matter (R. (3) 2). See *United States* v. *West*, 170 F. Supp. 200, 206–207 (N.D. Ohio). They were advised in a letter dated October 8, 1958, from the Acting Assistant Attorney General, Internal Security Division, that investigation of Army service records revealed that Gardner served in the Army from January 25, 1922 to May 30, 1925; that he was absent without leave for a short time during this period, as a result of which he had been tried by court martial and sentenced to two months' confinement at hard labor and to forfeit $20.00 per month in salary for that period; and that he re-enlisted in the Army on January 21, 1926, and was assigned to Fort Riley, Kansas, but deserted on May 11, 1926, and never returned (R. (3) 3). The Army records further reflected, the letter stated, that Gardner had given December 13, 1903, as his date of birth [11] and that he was not, at the time of the inquiry,

[11] Gardner testified, on cross-examination, at petitioner's trial that he was born in 1906 (R. 498). The court in the *West* case, in its opinion denying a motion for a new trial, observed that "The evidence offered at the hearing on the motion was

wanted by the Army as a deserter (*ibid.*). See also *United States* v. *West, supra,* 170 F. Supp. at 205. Thereafter, on October 16, 1958, the *West* defendants moved under Rule 33, F.R. Crim. P., for a new trial, relying on this newly discovered evidence (R. (3) 3). After a full hearing, lasting three and one-half days, in which witnesses were examined under oath and documents received in evidence, the motion was denied. *United States* v. *West, supra.* The Court of Appeals for the Sixth Circuit affirmed the denial of the motion for new trial in that case, 274 F. 2d 885.

Petitioner's motion for a new trial in this case (R. (3) 2–6) was filed in the District Court on October 17, 1958. The motion, after setting forth *verbatim* the above-mentioned letter from the Acting Assistant Attorney General, Internal Security Division, to defense counsel in the *West* case (R. (3) 3), alleged that this newly discovered evidence indicated that Gardner had given untruthful testimony about his military service in the *West* case and was inconsistent with his testimony on cross-examination in the instant case as to the date of his birth [12] (R. (3) 3–4). The motion further alleged that the newly discovered evidence indicated that Gardner had given false information to the F.B.I. (appearing in a statement furnished to petitioner at the trial pursuant to the provisions of 18 U.S.C. 3500 (the so-called Jencks Act)) to the effect (a) that he was born on July 13,

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to the effect that Gardner had voluntarily enlisted in the Army on January 25, 1922, at the age of 15 * * *. He accomplished this by misstating his date of birth as December 13, 1903, instead of the true date of birth which was July 13, 1906" (*United States* v. *West*, 170 F. Supp. 200, 205).

[12] See note 11, p. 24, *supra.*

1906; (b) that he had had no military service; (c) that he had been employed by the duPont Chemical Co. at Niagara Falls, New York, from 1925 to 1929; and (d) that he had resided at Niagara Falls, New York, from 1925 to 1929 (R. (3) 4). The motion recited that these facts established that Gardner had "committed perjury in the *West* case," that he "may have committed perjury" in the instant case,[13] and that he had "violated the very statute under which [petitioner] was being tried" by giving false information to the F.BI. (R. (3) 4).

On October 31, 1958, argument of the motion for a new trial (R. (3) 12–44) was had before Chief Judge Knous, who had presided at petitioner's trial. In the course of the argument, counsel for petitioner filed with the court a letter from E. I. duPont De Nemours and Co., Niagara Falls, which stated that Gardner worked for Roessler and Hasslacher Chemical Company from August 12, 1926 to February 16, [redacted] (R. (3) 15–16). It appeared from another source that duPont had taken over this company in 1930 (R. (3) 16). On behalf of the government, Mr. Donald E. Kelley, United States Attorney for the District of Colorado, filed with the court a statement reciting that neither the attorneys who had prosecuted petitioner's case, nor

[13] Gardner's date of birth was not material to any issue presented at his trial in the case at bar or in the *West* case. It would also appear that Gardner's testimony in the instant prosecution which petitioner says "may have" been perjurious, *i.e.*, that he was born in 1906, was the truth, and that it was the date of birth which he apparently gave the Army when he enlisted in 1922, *viz.*, 1903, in order to conceal the fact that he was too young to enlist, which he misrepresented (see note 11, p. 24, *supra*).

any other attorneys or agents of the Department of Justice, including members of the F.B.I., had had any knowledge of Gardner's military service at the time of trial or prior to the receipt of information from the Department of the Army under the circumstances related above (*supra,* pp. 24–25; R. (3) 7, 12–14).

Following argument, Judge Knous rendered an oral opinion denying petitioner's motion (R. (3) 10, 44–52). Judge Knous assumed, for purposes of ruling on the motion, that Gardner had misrepresented his military service history at the *West* trial, had given erroneous information to the F.B.I. in respect to his past employment and residences, and had made inconsistent statements with regard to the year of his birth (R. (3) 45, 46, 48–49, 51–52). He held, however, that, because none of these matters "went to a material issue in the case" and none had "any bearing whatsoever upon the question of the guilt or innocence of the defendant" (R. (3) 47, 48), and because the newly discovered evidence relied on was merely "cumulative" and "impeaching" (R. (3) 48–49), the motion presented no proper basis for the granting of a new trial (R. (3) 44–52).

On appeal, this judgment was affirmed without opinion.

THE SECOND MOTION FOR A NEW TRIAL

The second motion for a new trial also involves a claim of newly discovered evidence bearing on the credibility of Fred L. Gardner.

On cross-examination, Gardner testified that he thought his first marriage terminated (R. (71) 8–9) in divorce in March 1946, and that he remarried in November 1946. The specific dates differed from testimony Gardner gave at the trial in *United States* v. *West, et al.* (R. (71) 4–5, 11–12) and from information he had furnished to the F.B.I. When defense counsel interrogated the witness concerning these variations, government counsel suggested the possibility of a typographical error in the F.B.I. report (R. (71) 8–10). However, the trial judge ruled that the jury was to determine whether or not a typographical error existed, and the F.B.I. report was read to the jury by petitioner's counsel (R. (71) 9–10).

In the *West* case, on the hearing on the motion for a new trial, defense counsel questioned Gardner about these same alleged inconsistencies. Testimony at that hearing was as follows (R. (71) 13–16):

> Q. Now which of these three—well, I will withdraw that. What are the facts, Mr. Gardner, with respect, let us say, first to your divorce?
>
> A. Well, I am not certain. Here is what happened—do you want me to tell you actually what happened?
>
> Q. Yes, I would like to know.
>
> A. In June or approximately of 1945 we, my first wife and I, agreed upon a divorce and she agreed to get that divorce.
>
> Sometime later in that year her attorney requested that I sign some papers stating that it was impossible to formalize that divorce until these papers had been signed. I signed the papers and ask[ed] if he would let me know

what happened and I assumed that he did later on, let me know, because I knew I had gotten a divorce.

Q. How did you know you had gotten a divorce?

A. He sent me some papers.

Q. Have you got those papers?

A. I haven't them with me and I don't know whether I still have them or not.

Q. What was the name of this attorney?

A. I don't remember his name. He was an American Labor Party attorney in Yonkers. I am sure I have got his name some place at home.

Q. So that you don't even know for sure that you were ever divorced?

A. Yes, I do know I was divorced in Queens County Court.

Q. You are sure of that?

A. I am positive of that. There is no question about it.

* * * * *

Q. Now, Mr. Gardner, when did you marry—remarry, I mean?

A. Well, I think in, actuality there was no formal marriage in that sense, but as far as I was concerned I was married in November.

Q. Of what year?

A. Of 1945.

Q. Now what do you mean by no formal marriage in that sense?

A. I mean we didn't go through a ceremony.

Q. No ceremony at all?

A. No, sir.

THE COURT. Common law marriage?

THE WITNESS. Yes, sir.

Q. Common law marriage that was contracted, you think, some six months before the divorce?

A. Well, as far as I was concerned, I was divorced, I didn't know the technicalities of the thing, but we had agreed upon it, the lawyer said it would go through and in my mind it was a divorce.

Q. What State was this marriage contracted in?

A. Well, actually it was contracted in Pennsylvania. She was in Minneapolis and I was coming back from South Dakota and I stopped there and picked her up and we came on into Pittsburgh.

Q. I don't suppose you know, and I really shouldn't ask you for legal advice, Mr. Gardner, I don't suppose you know whether common law marriages are legal in Pennsylvania?

THE COURT. Well, that is a question of law. You don't need to answer that.

Q. You didn't check into that matter, did you?

THE COURT. You don't need to answer that.

MR. RABINOWITZ. I'm sorry.

Q. Well, why did you tell the FBI agents in Butte that you had been married in Minneapolis in 1945?

A. Well, I don't think that that was actually what I said. I think actually what I said was that I picked up my present wife up in Minneapolis and we went on to Pittsburgh in about November of 1945. Now what interpretation he placed on that I have no control over and I don't know. But I am sure that that is the fact because that is what I have always said when I was asked for the details of it.

Q. Well why did you tell counsel in this case that you were divorced in 1945 and married a few weeks later?

A. Because in my mind that is exactly what had happened.

Q. Why did you tell counsel in the Denver case that you were divorced in 1946 and married a few months later?

A. Because when I went from here to Denver that was my recollection there that I had made a mistake here, and when I got home my wife informed me that as far as she was concerned, and I agreed as far as I was concerned, it was 1945.

Q. You mean you and your wife decided on precisely when it was that you had gotten married?

A. Well, it wasn't a question of deciding on it, it was a question when in our minds it was actually a marriage was consummated.

The District Court wrote an opinion denying the motion (R. (71) 22–26), and the Court of Appeals affirmed.

SUMMARY OF ARGUMENT

I

Venue was properly laid in the District of Colorado, the place where the false affidavits were executed and placed in the mail. It is true that the offense was not completed until the papers were received in Washington, D.C., the prescribed place of filing, but 18 U.S.C. 3237 explicitly provides that an offense begun in one district and completed in another may be prosecuted in either. It cannot be said that the acts done in Colorado constituted mere preparation, for when the affidavits were placed in the mail

petitioner's active participation in the offense was at an end; the completion of the offense, which ensued in ordinary course, was at that point a matter beyond his control. Nor is it significant that the Labor Board's jurisdiction did not attach until the papers were actually received. We deal here with the classic situation of "a continuously moving act, commencing with the offender and hence ultimately consummated through him," *United States* v. *Lombardo*, 241 U.S. 73, 77.

II

The "two-witness" rule applicable in perjury cases does not apply to prosecutions under 18 U.S.C. 1001, the "false statements" statute, and the district court was not required to grant an instruction based on that rule.

The perjury rule, we emphasize, does not rest on constitutional considerations or upon statute. It is a rule, traceable to the common law, which has always been limited to the offense of perjury, and it rests upon the policy consideration that one compelled to testify should receive protection against harassment stimulated by retaliatory motives. *Weiler* v. *United States*, 323 U.S. 606. Petitioner was not compelled to file affidavits and there was no serious prospect, as in the case of one testifying in a bitterly fought lawsuit, that his act would engender resentment or hostility.

The "false statements" statute has been on the books for over a century and during that long period it has never been held that the "two-witness" rule applies to prosecutions thereunder. A practice which has stood so long must certainly be taken to accord

with the judgment of Congress, which has the power to fashion rules of evidence for the federal courts. Moreover, the action of Congress in making the filing of false affidavits under Section 9(h) subject to prosecution under 18 U.S.C. 1001, rather than under the perjury statute, must be regarded as a deliberate determination by the legislature that prosecution for this offense shall be subject to the traditional practice which has always prevailed in the case of all prosecutions under the "false statements" statute.

III

The evidence was clearly sufficient to support the jury's finding that the affidavits were false. It was shown, to begin with, that petitioner was a leading, active and zealous Communist over a period of years and that he was fully acquainted with Party policies, including those adopted upon the occasion of the enactment of Section 9(h). After petitioner submitted his ostensible resignation, he continued to engage in conduct which, if the testimony of the prosecution's witnesses is believed, is consistent only with continued membership in the Party. He confided to witness Gardner that the formal resignation was not an actual resignation and he gave Gardner detailed instructions as to how the latter should reactivate himself in the Party following his transfer to an assignment in Idaho. Petitioner was delegated important tasks by Communist labor union leaders. In conversations with witness Mason relating to various union affairs, he openly referred to himself as repre-

senting the Party leadership in Mine-Mill and he included himself within the term "us Communists."

Petitioner argues that the testimony as to his conversations with Gardner and Mason was not corroborated, and seeks support from this Court's decision in *Opper* v. *United States,* 348 U.S. 84. That case, however, deals with the matter of corroboration in an entirely different context, *i.e.,* where admissions are made to law-enforcement officials following an arrest. There is nothing in the present situation to warrant an inference that petitioner's admissions to Gardner and Mason might have been induced by fear, coercion, or hope of leniency. Moreover, we believe that petitioner's history did furnish corroboration of the Gardner and Mason testimony.

IV

Petitioner's various challenges to the admission or exclusion of evidence do not show, in any instance, the commission of prejudicial error.

A. Petitioner objects to the admission of evidence concerning his activities in the Communist Party during the period of 1942–1948, on the ground that such evidence tended to prejudice the jury against him and that it was unnecessary to offer it because of his willingness to stipulate that he was in the Party during that time. The short answer is that petitioner's offer to stipulate the bare fact of membership would hardly establish what the government was entitled to show—that petitioner was a dedicated and zealous member, that he was high in the Party councils and familiar with the Party's strategies, and that he represented

the Party leadership in the Mine-Mill union. It cannot be seriously questioned that the character of petitioner's membership was relevant to a judgment on the issue whether his purported resignation was real or sham.

B. Petitioner objects to testimony of a long-time Communist (Eckert) that the Party policy was that, once you joined the Party, you could not leave it without being expelled. This testimony was relevant because, as the trial judge ruled, there was evidence of petitioner's familiarity with the policy. In other words, it bore on the question whether petitioner's attitudes were such that he was a man who was likely to sever his connection with the Party in the absence of a breach between himself and the Party hierarchy. We emphasize further that the trial judge carefully instructed the jury that membership was a matter of mutual consent, *i.e.*, a member could resign irrespective of the organization's wishes.

C. Petitioner objects to limitations which were imposed upon his cross-examination of government witnesses when he was seeking to show possible bias or hostility.

As to witness Mason, the claim is that petitioner was prevented from showing that Mason feared denaturalization and might be engaged, for that reason, in currying favor with the government. But the evidence showed that Mason had revealed his past membership in the Communist Party to the Immigration and Naturalization Service in 1938, before he was naturalized. Thus, the evidence negated any supposition that Mason might have apprehended a denatural-

ization proceeding grounded on allegations of fraud.

As to witnesses Eckert and Gardner, petitioner sought to develop the theme that these men, having become members of other unions (United Automobile Workers and the Hod Carriers), might be biased against petitioner because those unions, in some matters, were rivals of petitioner's union (Mine-Mill). Assuredly, it was within the broad discretion of the trial judge, in controlling the conduct of the trial, to prevent a trial within a trial on the collateral issue of the extent to which the three unions in question might be deemed competitors or rivals.

V

The instruction on membership, which was similar in all essential respects to approved instructions given in other cases involving the issue of Party membership, was proper. The jury was advised that, in order to find that petitioner was a member of the Party on the critical dates, it must find that he desired to belong to the Party and that the Party considered him a member. The court instructed that a verdict of "guilty" could not be rested on isolated acts or statements showing corroboration or sympathy with the Party and that the jury must draw its ultimate inference as to membership or non-membership on the basis of all of the evidence.

The fact that the court referred to various criteria or indicia of membership which are elaborated in the Communist Control Act of 1954 (the court set out, without referring to the statute, eleven of the factors enumerated in that Act) furnishes no basis for objec-

tion. Any rational determination of the issue of membership would necessarily have to take into account considerations of the kind which the court set forth—whether petitioner, at the critical dates, had subjected himself to the discipline of the Party, or had executed orders or plans of the Party, or had been called upon by the Party for services, or had taken part in the councils of the Party. These, of course, are the very things that a member ordinarily does, and that a non-member does not do.

VI

Petitioner argues that the trial court improperly allowed the government to determine unilaterally what materials in its possession constituted "statements" for purposes of production under 18 U.S.C. 3500 (the Jencks Act). The district judge, to be sure, permitted the government to determine whether the documents within its possession were "statements" within the terms of the court's orders to produce. That, however, is precisely the procedure which this Court approved in *Palermo* v. *United States*, 360 U.S. 343, 354, when it observed that "the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court." The trial court did not abdicate, in favor of the government, any of the responsibilities with which it was charged. Indeed, it turned over to the defense all of the relevant documents which the government produced (some of which were, perhaps, beyond the reach of the statute), and it permitted the defense to cross-ex-

amine government witnesses extensively to determine if those witnesses had made any other producible statements.

Petitioner further argues that the trial court erroneously viewed Section 3500 as inapplicable to a witness' statements made to congressional investigators or to government attorneys. The record shows, however, that the "statements" in question were not ordered to be produced because the statutory requirements were not met, *i.e.*, the documents were not written statements "signed or otherwise adopted or approved" or oral statements "recorded contemporaneously" in "substantially verbatim" form.

VII

It is also contended that the trial court abused its discretion in failing to examine or to direct the production of grand jury minutes—both the minutes of the grand jury which returned the indictment in this case and the minutes of other grand juries before which the government witnesses who appeared in this case had testified.

A. We urge, first, that petitioner did not follow the avenues available to him for laying a proper foundation. Petitioner established, on cross-examination, that the government's witnesses had testified in various grand jury proceedings, but petitioner made no effort thereafter to ascertain (1) whether they had testified concerning the events or episodes which had proved significant at the trial of this case, or (2) whether, if so, they claimed that their grand jury testimony on these matters was the same as their trial

testimony. Petitioner's premise—one which we dispute—was that, once it appeared that government witnesses had testified before a grand jury, the court had no choice but to breach the secrecy of the grand jury minutes.

B. The decisions of this Court establish, we submit, that the secrecy of grand jury proceedings is not to be broken except when there is "compelling necessity" shown in specific "instances" and with "particularity," *United States* v. *Procter & Gamble,* 356 U.S. 677, 682. There is no "absolute right" to disclosure; the trial judge is to determine, in his informed "discretion", whether "the ends of justice" require an exception to the rule that grand jury proceedings are to be maintained inviolate, *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400. We do not say that the defense has the burden of proving inconsistencies between trial testimony and grand jury testimony; but it does have the burden, as this Court emphasized in the *Pittsburgh Plate Glass* case, of showing, by such avenues as are available to it, that there is a "particularized need."

C. Moreover, with one belated exception, the demands for disclosure were not appropriately limited. Demands were sweepingly made for all testimony of the witnesses in question, before all grand juries, relating in any way to the subject matter of the instant proceedings. In the only instance in which a demand was limited to particular episodes of significance in the instant case, the demand was addressed to grand jury minutes in another case. A factor weighing against production in that instance was that the case in question was still in its pre-trial stages.

D. A further factor weighing against a grant of the petitioner's requests was that the defense had already received, for impeachment purposes, a great wealth of material in the form of extra-judicial statements and trial transcripts. These materials span the period during which the grand juries had functioned. As the Court of Appeals held, "In view of prior statements of these witnesses made available to the defense, in which there appeared no suggestion of material inconsistency, it is unlikely that their statements to the grand jury occurring at a time between the giving of such statements and consistent statements upon trial would produce impeaching material."

E. Petitioner argues that, even if production of grand jury testimony to the defense is not "automatic", there is an automatic requirement that the trial court, upon request of the defense, examine grand jury material and thereupon turn that material over to the defense if it is found to contain inconsistencies. We do not believe that the Second Circuit's practice, upon which petitioner strongly relies, goes so far as to rob the trial judge of all discretion. In all events, this suggestion is inconsistent with the approach adopted by this Court, which has imposed upon the defense the burden of showing a particularized need. To require the trial judge to examine extensive grand jury materials whenever the defense requests it would be an intolerable burden for the courts and would necessarily be disruptive of criminal trials. Whatever this Court concludes on the question whether there was an abuse of discretion on the particular facts of this case, it should preserve, we submit, a rule of discretion.

VIII

The disposition of the motions for new trial (post-trial motions which were grounded on alleged newly discovered evidence) was a matter in which the trial court had broad discretion. That discretion was not abused. Here, the "new evidence" related to matters completely extraneous to the issues in the case and had possible utility only as a means of seeking to impeach one of the government's witnesses (Gardner). Impeaching material will ordinarily not serve as a basis for granting a new trial, and the circumstances here are far from exceptional.

Thus, it is claimed that Gardner was untruthful (in another case) in testifying on the matter of service in the armed forces (an issue not material in that case). In the instant case, petitioner's counsel, in cross-examining Gardner, made no effort to explore the matter of his military history. And, in the very case in which that testimony was given, the trial judge determined, after a full post-trial hearing, that it was not given with an intent to falsify.

As to the discrepancy in Gardner's statements (made on various occasions) concerning the date of his second marriage, *i.e.*, whether it was in 1945 or in 1946, it appears (1) that the fact of variation in statements on this subject was known to petitioner at the trial and was in fact exploited, and (2) that Gardner's uncertainty on the point had an entirely rational explanation—the fact that the marriage was a common law marriage, rather than one formally celebrated.

ARGUMENT

I

VENUE WAS PROPERLY LAID IN THE DISTRICT OF COLORADO

The affidavits which led to the indictment in this case were admittedly executed in Denver, Colorado, and mailed from that city to Washington, D.C., the prescribed place of filing in the case of officers of international unions.[14] Petitioner contends that, on this state of facts, he was subject to prosecution only in the District of Columbia. The Government submits (as held below) that the offense was begun in Colorado, although completed in the District of Columbia, and that this case falls squarely within 18 U.S.C. 3237 (*supra*, pp. 7–8), which provides that an offense "begun in one district and completed in another" may be prosecuted "in any district in which such offense was begun, continued, or completed."

There are cases in which it is doubtless difficult to draw the line between what has been characterized as "mere preparation" and the beginning of an offense. This case does not present that difficulty for, at the very least, the offense had begun at the stage when the affidavits were irrevocably placed in the United States mails. Indeed, at that point, petitioner's active participation in the commission of the offense was at an end; he had placed the affidavits beyond his control and only a failure in the United States mails

[14] Local union officers may file either in the regional office or in Washington, D.C. See the Board's Regulations, 29 C.F.R. § 101.3.

or a loss of the letters at the place of receipt could have prevented the completion of the offense. In fact, the letters were received and filed in ordinary course, and the offenses completed.

There is a long line of authority which supports the view that, in the circumstances outlined, venue was properly laid in Colorado—a location which, from the standpoint of petitioner, was certainly no less convenient than a trial in the District of Columbia, 2,000 miles from his residence. In *United States* v. *Lombardo*, 241 U.S. 73, 77, this Court said: "Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act, commencing with the offender and hence ultimately consummated through him, as the mailing of a letter * * *."

A case closely analogous to the instant one is *De Rosier* v. *United States*, 218 F. 2d 420 (C.A. 5), in which the defendant was convicted under 18 U.S.C. 1001 of submitting a false statement to the Post Office Loyalty Board. He had signed and sworn to a letter in Florida and sent it to the Loyalty Board in Washington, D.C. Sustaining the Florida venue, the Fifth Circuit stated (pp. 422, 423):

> * * * When the letter containing the false statements and the fabricated document [to a false resignation from the Klu Klux Klan] was prepared and forwarded to the Loyalty Board, there was set in motion the events which cul-

> minated in the commission of the offenses charged. * * *
>
> * * * * * *
>
> Whether the letter was mailed or sent by some other agency, it is implicit in the verdict of the jury that, in addition to the signing and swearing to a false statement, the appellant put the false documents out of his possession and into some agency's custody for transmission to the Loyalty Board at Washington, D.C., all of which was done by him in the Southern District of Florida. Consequently, the offense was begun in that district, and it became indictable either at the place of its beginning or at the place of its completion.[15] * * *

Similarly, in *Bridgeman* v. *United States,* 140 Fed. 577 (C.A. 9), the defendant, an Indian agent in Montana, prepared false vouchers in that state and mailed them to the Commissioner of Indian Affairs in Washington. The court held that the venue was properly laid in Montana (p. 591):

> * * * [i]t is contended that the court below had no jurisdiction of the case, for the reason that whatever offense is charged was committed in the District of Columbia, and not in Montana. The answer to this is that the offenses were at least commenced in the State of Montana, and therefore come within the provisions of Section 731 of the Revised Statutes [now 18 U.S.C. 3237].

To similar effect, see *Ex parte Shaffenberg,* Fed. Case No. 12,696 (C.C. Col.); *United States* v. *Newton,* 68 F. Supp. 952 (W.D. Va.), affirmed, 162 F. 2d 795 (C.A.

[15] In *De Rosier*, as here, the appellant *was not required* to file the statement, but he was given an *opportunity* to do so.

4). See also *Burton* v. *United States*, 202 U.S. 344; *In re Palliser*, 136 U.S. 257; *New York Central & H.R.R. Co.* v. *United States*, 166 Fed. 267 (C.A. 2); *United States* v. *Uram*, 148 F. 2d 187 (C.A. 2); *United States* v. *Downey*, 257 Fed. 366 (D. R.I.).

Petitioner's position does find support in the majority opinion in *United States* v. *Valenti*, 207 F. 2d 242 (C.A. 3), in which the court reasoned (p. 244) that "the act having legal significance is the filing of the noncommunist affidavit with the Board" and that the matter is not "within the jurisdiction of the Board" until the filing takes place. In our view, however, it is immaterial that the Board's jurisdiction attaches only when the affidavit is received and placed on file. The question is not whether an offense occurred at the moment when the affidavit was dropped in the mail; the question, rather, is whether that act marked the *beginning* of the offense. The answer is that it did because, at that point, the defendant had irrevocably set in motion and placed beyond his control the train of events which would normally result (and here did result) in the consummation of the offense. As Judge Hastie stated in his separate opinion in *Valenti* (p. 246), "* * * at that point [mailing] I think the offense was 'begun' with the result that when, thereafter, the offense was completed it became indictable either at the place of its beginning or the place of its completion."[16]

[16] Judge Hastie concurred in the result reached in *Valenti* on the limited ground that the Government had not adequately shown that the mailing occurred in the district where venue

The view expressed by Judge Hastie is the settled view—a view, as noted above, which finds clear support in the prior decisions of this Court and has long been followed by the federal courts generally.

II

THE "TWO-WITNESS" RULE APPLICABLE IN PERJURY CASES DOES NOT APPLY TO PROSECUTIONS UNDER 18 U.S.C. 1001

Petitioner contends that the district court erred in refusing to instruct the jury that in order to convict they had to find that the falsity of the affidavits was proved by the testimony of two witnesses or of one witness plus corroborating circumstances; in short, that the court should have followed the "two-witness" rule applicable to prosecutions for perjury, a rule described in *Weiler* v. *United States*, 323 U.S.

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was laid. On this view of the facts, the result reached in *Valenti* was, of course, a correct one.

Reass v. *United States*, 99 F. 2d 752 (C.A. 4), and *United States* v. *Borrow*, 101 F. Supp. 211 (D. N.J.), cited in the majority opinion in *Valenti*, are clearly distinguishable from the instant case. In each of those cases, a letter or statement was prepared in one district and the defendant personally carried it to another district, where he filed it with the governmental agency concerned. Accordingly, the defendants involved did not place the documents beyond their control until the filing took place. Indeed, in *Reass*, the court seemingly recognized that the result would have been different if the document had been mailed from outside the district of filing.

Cases of failure to file as required by law are likewise distinguishable; in such situations the situs of the crime is the place where the law requires that the act be performed. *Johnston* v. *United States*, 351 U.S. 215, 220; *Bowles* v. *United States*, 73 F. 2d 772 (C.A. 4), certiorari denied, 294 U.S. 710; *New York Central & H.R.R. Co.* v. *United States*, 166 Fed. 267 (C.A. 2).

606, as a "special rule which bars conviction for perjury solely upon the evidence of a single witness" 323 U.S. at 608–609.

The "two-witness" rule is not statutory; it traces back to the common law. In *Weiler,* the Court explained its rationale as follows (p. 609):

> * * * Lawsuits frequently engender in defeated lititants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions.
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> The crucial role of witnesses compelled to testify in trials at law has impelled the law to grant them special considerations. * * * Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon "an oath against an oath." The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

As a special rule governing the quantum of proof required in perjury cases, the "two-witness" rule, as the Court indicated in *Weiler,* rests in large part upon historical considerations; it is not a constitutional requirement and may be altered, qualified, or abrogated by Congress. See *Weiler* v. *United States, supra,* at 609–610, and *Hammer* v. *United States,* 271

U.S. 620,[17] cited and quoted in *Weiler*." The policy of the rule that witnesses "compelled to testify" should be protected does not apply to the case of an affidavit filed under Section 9(h) of the Taft-Hartley Act, for that Act compelled no one to file an affidavit, true or false.

In the Taft-Hartley Act, Congress, had it chosen to do so, could have made the filing of a false affidavit punishable as perjury, an approach which it has adopted in some comparable instances. See 5 U.S.C. 789; 13 U.S.C. 213; 22 U.S.C. 703; 26 U.S.C. 6065; 7206; 38 U.S.C. 787; 46 U.S.C. 22, 170(13), 231. It chose, however, to make the filing of a false non-Communist affidavit answerable under the provisions of Section 1001, the "false statement" statute.

Section 1001 and its predecessor statutes have now been on the books for nearly a hundred years and in all that time, so far as we can determine, it has seldom been suggested, and never held, that the filing of a false statement with the Government is subject to the perjury two-witness rule in instances where the Congress has not defined the offense as perjury. See the legislative history of Section 1001 as discussed in *United States* v. *Bramblett*, 348 U.S. 503, 508.

The courts of appeal which have considered the application of Section 1001 to affidavits filed under the Taft-Hartley Act have uniformly rejected the contention that the perjury rule should be applied. See, in addition to the holding below, *Fisher* v. *United*

[17] *Hammer* v. *United States*, 271 U.S. 620, applied the rule to a prosecution for subornation of perjury because unless perjury was proved there could be no subornation.

States, 231 F. 2d 99, 105–106 (C.A. 9); *United States* v. *Killian*, 246 F. 2d 77 (C.A. 7); *Fisher v. United States*, 254 F. 2d 302 (C.A. 9), certiorari denied, 358 U.S. 895; *Sells* v. *United States*, 262 F. 2d 815, 821 (C.A. 10), certiorari denied, 360 U.S. 913; *Gold* v. *United States*, 237 F. 2d 764 (C.A.D.C.), reversed on other grounds, 352 U.S. 985.[18]

Apart from statute, the perjury rule has been applied only to cases of false testimony. Since Congress may lay down rules of evidence for the federal courts (*Palermo* v. *United States*, 360 U.S. 343) and since the "two-witness" rule is not a constitutional requirement, the deliberate action taken by Congress in making the filing of a false Taft-Hartley affidavit punishable under Section 1001, rather than under the perjury statute, carries the consequence that the special perjury rule does not govern.

III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT

A. There is no substance to petitioner's contention that the evidence is insufficient to support the jury's finding that the affidavits were false. The jury was fully justified in finding, on the basis of the evidence reviewed above (pp. 11–21), that petitioner's pre-1949 membership in the Party—which is undisputed—was not terminated by his so-called "resignation" of August 1949, but continued uninterrupted

[18] In *Gold*, the only opinion filed was one by Circuit Judge Bazelon, who thought that the conviction should be reversed and the perjury rule applied. The court of appeals affirmed the conviction in that case by an evenly divided court, four to four.

beyond that date and beyond the dates of both the affidavits in issue (December 19, 1951 and December 3, 1952).[19] Cf. *Hupman* v. *United States*, 219 F. 2d 243, 248 (C.A. 6), certiorari denied, 349 U.S. 953; *Jencks* v. *United States*, 226 F. 2d 540, 547–548 (C.A. 5), reversed on other grounds, 353 U.S. 657; *Fisher* v. *United States*, 231 F. 2d 99, 103 (C.A. 9); *Bryson* v. *United States*, 238 F. 2d 657, 663 (C.A. 9), certiorari denied, 355 U.S. 817.

Petitioner's membership in the Communist Party was traced back to at least 1942 (R. 41–42). The evidence showed that petitioner carried out the Party's instructions in formulating the policy of Mine-Mill (R. 43, 44, 45). Petitioner in 1946 became a member of the "Steering Committee" whose purpose it was to co-ordinate Party activities within the Union (R. 47). The "Steering Committee" met "very frequently" (R. 49) and was usually presided over by petitioner "or some other ranking Communist official" (R. 51).

After the passage of the Labor Management Relations Act, 1947 (61 Stat. 136), a large group of leading Party members who held offices in labor unions, including petitioner, met in New York City for the

[19] Since petitioner's prison sentences on the "affiliation" counts were made to run concurrently with his prison sentences on the "membership" counts and since the fines which he received were imposed only on the "membership" counts (*supra*, p. 9) there is no need to consider the sufficiency of the evidence under the "affiliation" counts. *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642, fn. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Brooks* v. *United States*, 267 U.S. 432, 441.

purpose of formulating a Party policy with respect to the affidavit requirement of the new Act The policy originally adopted was to refrain from filing affidavits (R. 83–89). Petitioner indicated his dissatisfaction with this policy but adhered to the Party line (R. 88–89). Petitioner related this policy to his fellow Communist Mine-Mill officers a few weeks later (R. 88–89) and participated in a discussion of how the law might be circumvented (R. 91–92).

Mine-Mill followed the policy advocated by the Party until July 1949. At that time, the Union decided to comply with the affidavit requirement because Mine-Mill had lost a number of elections (R. 457–459, 460–462).

A few days after the decision to comply with the affidavit requirement, petitioner told government witness Mason that he would "resign from the Party" in order to maintain his Union office (R. 463–464). He showed Mason a statement and informed him that it had been cleared with the Party people in New York (R. 463–465). The August 15, 1949, issue of the Union paper contained an article by petitioner announcing that he had "resign[ed] from the Communist Party, of which I have been a member, in order to make it possible for me to sign the Taft-Hartley affidavit" (G. Ex. 8, R. 890). The exact date of the "resignation" does not appear from the record, nor does the record contain any document purporting to constitute the resignation.

In the fall of 1951 (after petitioner's alleged resignation), on the occasion of petitioner's first meeting with Government witness Fred Gardner, petitioner admitted to Gardner his continued membership in the

Communist Party. Petitioner told Gardner that he (Gardner) had come to Mine-Mill with "excellent recommendations" from "the Communist Party of Cleveland" (R. 443). Petitioner related to Gardner that he (petitioner) had had difficulty in crossing the border into Canada because of his "membership in the Party" and "public resignation" therefrom (R. 443). He confided to Gardner that his formal resignation from the Party in 1949 was not an actual resignation and termed it a "mistake" because it had provided the "enemies of the Party" with an opportunity to point out that it was not a "true" resignation (R. 441–445, 445–446).

In March 1952,[20] the Communist labor union leaders delegated to petitioner the assignment of communicating with one Salon, a leader of the World Federation of Labor Unions, in Paris. The Soviet delegation to this organization, meeting in Paris, was attempting to force the "American left-wing" unions to form a "third federation." The decision whether to do this had been delegated by the American Communist Party to the unions themselves. After discussing the problem, the officers of the "left-wing unions" decided that they were not in favor of such a move and assigned to petitioner the task of informing the World Federation of Labor Unions of this decision (R. 465–470).

In March 1953, a staff conference of Mine-Mill was held in Denver, Colorado (R. 468–470). The pro-

[20] This date falls between the execution of the first (December 19, 1951) and second (December 3, 1952) affidavits filed by petitioner.

posed agenda for this conference contained a "legislative program" which listed a number of items such as "repeal of the McCarran Act" and the "fight against witch hunting." When petitioner's attention was called (by witness Mason) to the fact that the Union's legislative program listed no matters pertaining to the betterment of working conditions, petitioner admitted the error and directed the insertion of additional matters in the program (R. 468–471). He told Mason, however, that "these other things too like repeal of the McCarran Act are important" because "[w]hen they get us Communists they will be after people like you if we don't get these laws repealed" (R. 471–472).

In June 1953, witness Gardner was transferred by Mine-Mill to a new assignment in the Coeur d'Alene Mining District of Idaho. Petitioner instructed him to stop off in Denver on his way to Idaho for a "briefing." (R. 445–446). At a meeting in petitioner's home in Denver, petitioner told Gardner the particulars of a factional dispute between Mine-Mill Party members in the Coeur d'Alene area and warned him that for this reason he should "remain aloof" from any Party activity until further notified. He also told Gardner that he felt certain that the dispute would be resolved by the expulsion of certain persons from the Party and that Gardner could reactivate himself in the Party upon being contacted by someone whom petitioner would identify to him beforehand (R. 446–448).

In a conversation with petitioner in August 1953, at Butte, Montana (R. 475–476), witness Mason ac-

cused petitioner and his Party-member subordinates in the Union of trying to undermine the leadership of the Union's District No. 1 in the midst of a bargaining conflict with employers in that area, because the District No. 1 leadership was opposed to Communist domination of Mine-Mill. Mason stated that he recognized that petitioner was the leader of the Party in the Union and was talking to him in that capacity, warning him that the Party's tactics had made some of the Union's leadership in Montana angry. Petitioner did not deny these accusations, but apologized to Mason and told him that he had pursued this policy because he had been misinformed by Clark, the Union's President. At one point in the conversation, petitioner offered to resign his office as Secretary-Treasurer and at another he asked Mason to come to Denver to discuss these difficulties with him and other Communist Party members in the Union (R. 477–479).

In a sequel to this conversation, which took place in Denver (R. 480–481), Mason reverted to the matter discussed in Butte and stated that conditions within the Union caused by Communist domination, such as the policy of the Union paper of constantly criticizing the foreign policy of the United States, should be changed to conform to the thinking, aims and aspirations of the rank and file membership. Petitioner advised Mason that the position the latter had outlined was "in direct opposition to the Party and that his suggestion that the Policy of the paper be changed was not "realistic." He went on to state that the Party leadership in the Union, including himself, felt

that there should be "no compromises" because there had been "too many compromises already." He noted that "the Soviet Union is becoming stronger," and that this was true also of the "position of the Communist[s] in the Union," who, along with other Communists, had been able to "repulse the raid and hold this union and other unions" (R. 482–484). When Mason threatened an open fight on the Communist issue, petitioner pointed out that he would have the machine and the paper to use against Mason in such a fight. He concluded the conversation by telling Mason that he (Mason) had been "invited to get into the Party" and that "had [he] done so" he "would be sitting high in the councils of this organization with us" (R. 484–485).

B. Petitioner argues that the evidence consists mainly of oral admissions on his part in six conversations with two men, and that oral admissions are always received with caution in criminal cases, especially where there is little or no independent corroboration, for which he cites *Opper* v. *United States*, 348 U.S. 84, 90–93. The *Opper* case, however, is clearly distinguishable from the case at bar. That case dealt with the question of the quantum of evidence, corroborative of an extra-judicial admission or confession to law enforcement authorities, required to sustain a conviction. The requirement that there be some such corroborative evidence—and very little is required (see 348 U.S. at 92–93)—is founded on the law's concern lest a conviction be based solely on an untrue admission or confession induced by fear, coercion, or hope of leniency. Wigmore, *Evidence* (3d ed.

1940), §§ 821, 822, 2071; 2 Wharton, *Criminal Evidence* (12th ed. 1955), §§ 393–394, 372–383; *Bram* v. *United States*, 168 U.S. 532, 562–564; *Wilson* v. *United States*, 162 U.S. 613, 622–623; *Opper* v. *United States*, *supra*; *Smith* v. *United States*, 348 U.S. 147, 153. Petitioner's admissions, on the other hand, were of an entirely different sort, having been made prior to arrest and to private individuals, rather than to law-enforcement authorities. The rule requiring corroboration of admissions or confessions is thus inapplicable. In addition, we point out that petitioner's admissions were amply corroborated by the extensive evidence of his activities as a Party member.

Petitioner argues (Br. 47) that because the evidence of his acts as an admitted Party member related to preresignation events, it cannot corroborate the proof that he was still a member of the Party at the time he signed the affidavits. But as a matter of logic and of common experience it is clear that the evidence relating to the pre-resignation period showed the nature of petitioner's membership (whether active or inactive) and the extent of his adherence to the Communist program. This evidence overwhelmingly showed that petitioner was an active and disciplined member of the Party, and that he zealously cooperated with high ranking Communist officers in organizing the "Steering Committee" and in "steering" the Union in accordance with the policies and dictates of the Party. He was shown to be a dedicated and active Party member, not merely a technical or casual one. This evidence also demonstrated that the Party had a policy that "once having joined the Communist

Party you could not leave without being expelled" (R. 117–118), and that petitioner was cognizant of the Party's policy (R. 463–464). Thus, the proof of petitioner's pre-resignation activities not only corroborated the admissions that petitioner made to Gardner and Mason, but removed any ambiguity which might have surrounded those admissions.

IV

THERE WAS NO PREJUDICIAL ERROR IN THE ADMISSION OR EXCLUSION OF EVIDENCE

Petitioner argues a number of questions as to the admission or exclusion of evidence and as to the limitations imposed on cross-examination. All of the rulings which petitioner challenges were, we submit, within the discretion of the trial judge, and there is no showing of an abuse of discretion or of prejudicial error.

A. THE TESTIMONY AS TO PETITIONER'S PAST (PRE-1951) MEMBERSHIP IN THE COMMUNIST PARTY

Government witness Eckert testified as to petitioner's membership and activities in the Communist Party from 1942 to 1948. Petitioner objected to the admission of the testimony on the ground that he had offered to stipulate that he was a member of the Party from 1941 until August 1949, and that the evidence as to his membership and activities during the 1942–1948 period would be prejudicial and inflammatory (R. 19, 20, 802). The claim is made that testimony as to his Communist activities would tend so strongly to prejudice the jury against him that it should have been excluded, even if relevant.

It is true that what the prosecution had to prove was that petitioner was a member of the Communist Party on December 19, 1951, and December 3, 1952. But to do this the prosecution was certainly entitled to show the nature of petitioner's membership and the extent of his activities as a Communist in the union. In determining whether the purported resignation was authentic, it was highly relevant that petitioner had been an active and disciplined member of the Party, and (as we have pointed out) that he had zealously cooperated with high-ranking Communist officers in organizing the "Steering Committee" and in "steering" the union in accordance with the policies and dictates of the Party. Taking the testimony of petitioner's 1942–1948 activities together with the testimony as to his statements and activities after 1952, the jury could properly infer that his "resignation" in 1949 was a pretense designed to present an appearance of compliance with the requirements of the Taft-Hartley Act. Taking into account the whole story of petitioner's dedication to the Party and the nature and extent of his activities, including "the time element and other factors," the inference of petitioner's Party membership in 1951 and 1952 was a compelling one. See *Maggio* v. *Zeitz*, 333 U.S. 56, 65; *Hupman* v. *United States*, 219 F. 2d 243, 248 (C.A. 6), certiorari denied, 349 U.S. 953.

Petitioner's offer to stipulate the bare fact of his Party membership from 1942 to 1948 could hardly prove what the Government sought to establish. *Jones* v. *Allen*, 85 Fed. 523 (C.A. 8); *McHenry* v. *United States*, 276 Fed. 761 (C.A.D.C.). The Gov-

ernment was entitled "to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." *Dunning* v. *Maine Central Railroad Co.*, 91 Me. 87, 97, 39 Atl. 352, 356. Moreover, the significance of bare membership would fall far short of that attaching to proof that petitioner was a prominent, active, zealous and dedicated member—one likely to wish to continue in the Party.

The evidence being highly relevant, petitioner has the burden of showing that its admission was an abuse of discretion. Wigmore, *Evidence* (3d ed. 1940), § 2591. Petitioner's argument that the testimony concerning his Party activities was so prejudicial and inflammatory that it deprive him of a fair trial obviously goes too far. On his argument, a factual recital of Communist activity in a labor union would necessarily be so provocative and prejudicial as to inflame the jury; and no Communist could have a fair trial in any case involving Party membership. But see *Dennis* v. *United States*, 339 U.S. 162.

B. ECKERT'S TESTIMONY AS TO THE "NO-RESIGNATION POLICY"

Petitioner also objects to the admission of Eckert's testimony that, on the basis of his long experience (17 years) in the Party, he knew that its policy was that "once having joined the Communist Party you could not leave without being expelled" (R. 117–18).

Of course, as the trial court properly charged the jury (R. 71), for purposes of Section 9(h) and for

the purposes of this case, "membership" in the Communist Party is a matter of mutual consent; if petitioner had submitted to the Party a *bona fide* resignation, he would not be guilty of a false affidavit whether the Party accepted his resignation or not. But in the instant case, in addition to Eckert's testimony as to the "no resignation" policy, there was testimony from which the jury could infer that Travis knew about the Party's policy and intended to comply with it. Mason testified that petitioner told him in July 1949 that he had "cleared" his resignation statement "with Ben Gold and the Party people in New York" (R. 463–464). Taking that testimony with Eckert's account of the Party's "no resignation" policy and Gardner's testimony that in 1951 petitioner told him that his "public resignation was a mistake because * * * the enemies of the Party recognized that this was not an actual resignation" (R. 444–445), the jury was justified in inferring that the petitioner, a man conversant with the policies of the Party, knew of the policy Eckert described and that he intended only to give the appearance of resigning.[21]

[21] The trial court recognized that the "policy" had to be connected up with petitioner. The court stated, "[W]hat I understand by 'connection' is that there will be evidence from which the jury can infer that Mr. Travis was fully acquainted and had personal knowledge of this policy" (R. 11[1]). The court also stated, "[I]f that evidence [of Mason and Gardner] is considered along with all the other evidence about Travis' association with the Communist Party, that an inference could be drawn from the evidence that he did know of this policy of resignation and that was inherent to the discussions" (R. 790–791).

Petitioner also suggests that Eckert was not qualified as an expert and that the policies of the Communist Party do not call for expert testimony. But the court and counsel both treated Eckert as an expert witness (Tr. 86, 155–156; R. 790–791), and it is well settled that the doctrines and practices of the Communist Party are a proper subject of expert testimony. *United States* v. *Dennis*, 183 F. 2d 201, 229 (C.A. 2), affirmed, 341 U.S. 494; *Frankfeld* v. *United States*, 198 F. 2d 679, 689 (C.A. 4), certiorari denied, 344 U.S. 922.

C. LIMITATIONS ON THE CROSS-EXAMINATION OF GOVERNMENT WITNESSES

Petitioner argues that his cross-examination of Government witnesses was improperly restricted. He contends, first, that the trial court erred in refusing to permit a line of inquiry calculated to show that witness Mason, in becoming an informant for the Government in 1952, was motivated by fear of denaturalization and the hope that he would be accorded immunity if he aided the Government. Secondly, he challenges restrictions on cross-examination of witnesses Eckert and Gardner designed to show rivalry between the labor organizations by which these witnesses were employed and Mine-Mill, petitioner's union. The rivalry, he contends, would have tended to show bias and hostility on the part of these witnesses toward petitioner. In both instances, we believe that the trial judge acted well within the bounds of his discretion.

(1) At the trial, the defense elicited from Mason (on cross-examination) that he was a naturalized

citizen, having acquired citizenship in 1938 (R. 736–738). Mason had previously testified on direct that he had been a member of the Communist Party for a short period in the early 1930's (R. 455, 737–738). The cross-examination also revealed that Mason had been questioned about his past membership in the Party by the Immigration and Naturalization Service in 1938 (R. 737–739). The defense then attempted to ask the witness whether he had been questioned by the Service again about this same matter in 1952 (R. 738–739). An objection to this question was sustained (*ibid.*).

In the colloquy which followed in chambers, the defense told the court it wished to attempt to show that Mason had again been questioned about his past Party membership by the Immigration and Naturalization Service in 1952; that, at that time, he (Mason) knew that Congress, in 1950, had enacted a statute (the McCarran Act) which permits the deportation of aliens who have been members of the Communist Party; that he also knew that the immigration laws provide for the denaturalization of those who obtained citizenship by fraud; and that, as a result of this situation, he knew or believed that he was subject to denaturalization followed by deportation. The defense further stated that it was attempting to show that because of these circumstances Mason agreed under duress to become an informant for the FBI. Petitioner based his right to pursue this inquiry on the asserted right of a defendant to show on cross-examination that a Government witness has an interest in testifying (R. 739–741). After being questioned

by the court regarding the basis of petitioner's claim that promises or threats had been made to Mason (R. 741–742), petitioner's counsel explained that he had no knowledge of promises or threats, but said that he had been informed that during the pertinent period the witness "was going around asking people questions about his status as an alien" (*ibid.*) and was "very, very concerned with that problem" (R. 743–744). In sustaining the Government's objection, the court stated (*ibid.*):

> I do not think the inference is warranted, the inference [that] there were threats or there was any deal made or anything, however you wish to designate it in what you have just stated, and except for that I am convinced that the evidence is entirely irrelevant.

There is no doubt that the accused in a criminal case may seek to show by cross-examination that the testimony of a Government witness is biased because it is given under promise or expectation of immunity or under the coercive effect of his detention by Government officers. *Alford* v. *United States,* 282 U.S. 687, 693; *Spaeth* v. *United States,* 232 F. 2d 776, 778–779 (C.A. 6); Wigmore, *Evidence* (3d ed. 1940), § 967. But there must be some reasonable basis for an inference of bias or favor, *e.g.,* a showing that the witness might have committed a crime, or was in custody, or was at any rate in a position where he would have need to look for leniency. In the instant case, the evidence was that Mason had admitted his past membership in the Party to the Immigration and Nat-

uralization Service in 1938,[22] *before he was naturalized.* Thus, the evidence *negated* any supposition that in 1958 he was in danger of a denaturalization proceeding based on fraud.[23]

(2) Petitioner also complains that the district judge restricted his cross-examination of witnesses Eckert and Gardner with respect to rivalry between the unions by which they were employed at the time of the trial and Mine-Mill. Both Eckert and Gardner had been former officials of Mine-Mill (R. 355, 437–438). At the time of the trial, Eckert was employed by the United Automobile Workers (UAW), and Gardner by the Hod Carriers' Union (R. 26–27, 437–438). The cross-examination in question sought to develop the theme that these two witnesses, because their unions were rivals of Mine-Mill in regard to representation of various locals and in elections before the N.L.R.B., were prejudiced against petitioner in his capacity as a Mine-Mill leader (R. 355–356, 568–569).

The settled rule is that evidence to show hostility of a witness toward an accused must be direct and positive, not remote, indirect and uncertain. Baer and Ballicer, *Cross-Examination and Summation* (1933), § 20; 5 Jones, *Evidence* (2d ed. 1926), § 2352. It is proper, and usually necessary, for the court to limit cross-examination which aims only at showing bias or

[22] He also admitted his past membership when questioned again by the Service in 1952 (R. 738–742).

[23] The provision of the Immigration and Naturalization Act (8 U.S.C. 1251(a)(b)(c)) making past membership in the Communist Party a ground for deportation applies only to aliens. *Galvan* v. *Press*, 347 U.S. 522.

hostility. And the exclusion of questions which at most would have only a slight bearing on the issue of a witness' bias or credibility is not reversible error. *District of Columbia* v. *Clawans*, 300 U.S. 617, 632.

To make out a persuasive connection between the alleged union rivalry and the credibility of the witnesses against petitioner, the jury would not only have had to find hostility between the unions, but would also have been obliged to infer that the rivalry or hostility carried over to personal relationships. Whether the unions were in fact hostile was, at least in the case of the union employing Gardner, in dispute. To support petitioner's claim that the restriction of cross-examination was improper and an abuse of discretion, the Court would have to say that petitioner should have been permitted to establish the alleged inter-union hostility by extensive cross-examination on that collateral and extraneous issue. If that had been permitted, the Government would have been entitled to attempt to disprove the rivalry on re-direct, or to attempt to establish that the competition between UAW and Hod Carriers with Mine-Mill was no more violent than their competition with other unions, or, for that matter, with each other. The likely result would have been that the issue of petitioner's guilt or innocence would have been entangled in a mass of evidence as to trade-union rivalry. The district court, we submit, properly exercised its discretion in ruling this out, and in restricting the cross-examination to matters having a reasonable degree of proximity to the issues raised by the indictment.

V

THE "MEMBERSHIP" INSTRUCTION WAS CORRECT

In its instruction to the jury on the meaning of "membership" in the Communist Party, the district court incorporated eleven of the fourteen "criteria" of membership listed in Section 5 of the Communist Control Act of 1954, 50 U.S.C. 844, and told the jury that "[t]hese are some of the indicia of Communist Party membership" (R. 872). The judge also instructed the jury to consider "all the evidence" bearing on the question (R. 872).

Petitioner attacks the constitutionality of Section 5 and claims that the charge permitted the jury to find guilt on the basis of a single item of evidence coming within one of the "criteria" and that the criteria themselves are so vague and imprecise that their use amounted to a denial of due process.

This is not a prosecution under the 1954 Act, however, and the court's charge merely used the "indicia" to illustrate the type of fact which one would take into account in any ordinary process of reasoning in determining whether the petitioner was a "member" on the critical dates.

The court made it clear to the jury that petitioner could not be convicted merely because, at some time prior to the affidavits, he had been a member of or affiliated with the Party, and that a verdict of guilty could not be predicated on "isolated" acts or statements showing cooperation or sympathy with the Party (R. 871). The charge, in language based on the concurring opinion of Mr. Justice Burton in

Jencks v. *United States*, 353 U.S. 657, 679, emphasized that to find that petitioner was a member of the Party (on the dates of the affidavits) one must conclude that he desired to belong to the Party and that the Party considered him a member. To decide that question it was obviously necessary for the jury to take into account such matters as whether petitioner had subjected himself to the discipline of the Party, had executed orders or plans of the organization, had been called upon by the organization for services, and had taken part in the councils of the Party. Those are the very things that a "member" usually does and that nonmembers do not ordinarily do. No single item is conclusive, but under the instructions given the jury could find, and find properly on the basis of an accumulation of acts and statements, that the petitioner was a member of the Communist Party on the dates when he swore that he was not.

It is significant that petitioner cites no authority for his argument that the charge on membership was vague. In other cases involving Party membership, charges similar in all relevant essentials to that of Judge Knous have been held sufficient and proper. See, *e.g.*, *Fisher* v. *United States*, 231 F. 2d 99, 106–107 (C.A. 9); *Lohman* v. *United States*, 251 F. 2d 951, 954 (C.A. 6).

In *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531, 558–561 (C.A.D.C.), reversed on other grounds, 351 U.S. 115, similar objection was raised with respect to Section 13(c) of the Subversive Activities Control Act (50 U.S.C. 792

(e)). Section 13(e) directs the Subversive Activities Control Board to take into consideration, in determining whether an organization is a Communist-action organization required to register under the Act, eight evidentiary factors listed therein. The Party claimed that the Section violated due process because these factors were irrelevant, vague and lacking in rational relation to the derivative facts to be established. In rejecting the argument the court of appeals said (at p. 559):

> * * * Having made these several findings [enumerated in Section 13(e)], the Board must distil from the composite an ultimate finding whether the respondent is or is not under foreign control, etc. There is nothing unusual about this process; indeed it is quite elementary. It is a familiar process of adjudication based upon fact-finding. Frequently a case discloses numerous basic facts established by the evidence, upon which the trial tribunal exercises its reasoning power and deduces a derivative or ultimate finding * * *.
>
> Moreover this catalog in Section 13(e) is not exclusive. These eight items must be considered, but others which are relevant and of material effect and are offered in competent form must be considered also. Nothing in the statute hints at an exclusive criterion. The Board should, and so far as we can tell did, admit and consider whatever is competent, relevant and material.[24]

[24] Petitioner contends that Section 5 of the 1954 Act should be considered as *ex post facto* legislation if applied to this case. But the enumeration by Congress of types of evidence which it considers to be germane to the determination of mem-

VI

THE DISTRICT COURT DID NOT ERR IN ITS RULINGS UNDER 18 U.S.C. 3500

In *Palermo* v. *United States*, 360 U.S. 343, this Court, referring to Section 3500 (the Jencks Act), stated (p. 354):

> The statute itself provides no procedure for making a determination whether a particular statement comes within the terms of (e) and thus may be produced if related to the subject matter of the witness' testimony. Ordinarily the defense demand will be only for those statements which satisfy the statutory limitations. Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court * * *.

At the trial, petitioner's counsel made requests, after the testimony of each government witness, for the production of "statements" given by the witness to agents for the government. In each instance, certain documents were thereupon produced.

The trial court ruled (R. 221–233), during the defense's cross-examination of the government's witnesses, that the defense would have an opportunity to attempt to lay a foundation for the production of additional documents (R. 118–120, 448–450, 486–487) by examining the witnesses out of the presence of the

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bership in the Communist Party, when the evidence so described is relevant and probative by ordinary processes of reasoning, is not *ex post facto* legislation. See *Fisher* v. *United States*, 231 F. 2d 99, 107, fn. 2 (C.A. 9); cf. *Calder* v. *Bull*, 3 Dall. 386, 390.

jury, and that the court would then rule on the question whether there were any additional statements within Section 3500(e). This procedure was followed. Each of the government's three witnesses was cross-examined extensively in regard to his interviews and conversations with agents of the government. He was asked whether notes were taken, whether he had signed any document, and so on (R. 155–195, 195–223, 255–270, 273–290, 345–354, 372–384 (Eckert); R. 599–626, 631–655 (Gardner); R. 750–780 (Mason)). At various stages during such examination and at the completion of each interrogation, the defense moved for the production of additional documents (R. 251–252, 270–271, 384–385, 390, 655–656, 657–658, 780). The court denied the motions on the ground that the defense had failed to show that the witnesses had made statements (other than those statements already produced) which were within the definition of "statement" appearing in Section 3500(e) and were related to the subject matter of the witness' direct testimony (R. 252–253, 270–271, 390–391, 656–658, 780–782).

The petitioner attacks this procedure on the ground that the court ruled that the prosecution could determine unilaterally what materials in its possession constituted "statements" for purposes of Section 3500(e). The argument rests upon a misreading of the record. Of course, as this Court pointed out in *Palermo* (*supra*, p. 69), the government must, in relation to each document, make the initial determination whether a document is a "statement" within the terms of the court's order. With respect to "statements"

by Eckert and Gardner, the government produced for the court's inspection a number of documents. After these had been submitted to the court, but before they were turned over to the defense pursuant to subdivision (e), the prosecuting attorney suggested that some of the documents produced were not "statements" as defined by subsection (e) and asked the court to reconsider whether they were within Section 3500 (R. 488–489, 492–493, 493–494). The court declined, stating (R. 490):

> * * * I want to point out that under 3500 I don't see any contemplation in here of the Court's determination after you have submitted the matters as statements of whether they are statements or not. It is the Court's sole duty under 3500 where you have produced the material to simply excise the portions of said statement which do not relate to the subject matter of the testimony of the witness.

The court's subsequent remark that "[w]hat is produced in the first instance is a matter that you [*i.e.*, the government] determine" (R. 492) was made in the context just described, and clearly applied only to the situation where the government had already produced documents, for the court had already ruled that the defense could cross-examine to determine whether additional statements should be ordered produced (R. 221–233). Obviously, under the language of Section 3500, the government must make an initial determination as to what an order to produce under that section requires. The trial court, however, did not abdicate its ultimate authority to decide what

should be produced, at least for purposes of an *in camera* inspection.[25]

Petitioner's additional argument that the trial court erroneously interpreted Section 3500 as not applying to statements made to an investigator for a congressional committee or to statements made to government attorneys stands on no better footing. The record shows that the court refused to order the production of such "statements" because the defense had failed to show that the witnesses, in their interviews and conversations with congressional investigators and government attorneys, had "signed or otherwise adopted or approved" any written statement on the subject matter of their testimony, or had made any oral statements which were recorded "contemporaneously" and "substantially verbatim" (R. 270–271, 384–391, 655–658, 780–782).[26]

VII

THE DISTRICT COURT PROPERLY DENIED PETITIONER'S MOTIONS FOR PRODUCTION OF THE GRAND JURY TESTIMONY OF THE PROSECUTION'S WITNESSES

A. In contending that the district court erred in failing to grant access to grand jury minutes (the minutes of the grand jury which returned the indictment in this case and those of other grand juries be-

[25] In *United States* v. *McKeever*, 271 F. 2d 669, 674 (C.A. 2), the court approved the procedure of a *voir dire* examination to determine whether reports were producible.

[26] For factual support of the court's rulings, see R. 217–221, 255–258, 273–290, 345–354, 372–384, 623–626, 631–655. It should be noted that in at least one instance the defense had, and used, a transcript of a witness' testimony before a committee (R. 132–133, 750–780).

fore whom the prosecution's witnesses had testified), petitioner argues (Br. 32) that "the trial judge sustained the prosecution's objections to questions put by the defense (R. 403–404, 530–535, 538, 686–687) to the prosecution witnesses, the purpose of which was to ascertain whether or not they had testified to the grand jury with respect to particular episodes which they testified about at the trial—a ruling which was erroneous and prejudicial in itself, quite apart from its bearing on the matter of access to the minutes." The same contention was advanced in the petition for certiorari (pp. 26–28). As we earlier pointed out in our brief in opposition (pp. 23–24), this is not borne out by the record. In the instances cited by petitioner for the proposition that the trial judge cut off interrogation as to testimony previously given before grand juries, the court did so because the questions were deemed improper in form, scope, or purpose. Whether or not these rulings were uniformly correct, the significant point is that at numerous other places in the record (which petitioner persists in ignoring) petitioner's counsel did ask each of the government's witnesses whether they had testified before grand juries in relation to petitioner, and the questions were allowed and answered. In an appendix to our brief in opposition (pp. 26–33), we have set forth the text of the pertinent excerpts.[27] It should be observed that in each instance petitioner dropped the matter after ascertaining that the witness had testified before grand

[27] The citations appearing at pages 26–33 of the brief in opposition are to the original transcript of record. The same material now appears, however, in the printed record.

juries. No effort was made to ask whether the witness had testified as to particular events or episodes which had become relevant or crucial at the trial. Nor were any of the witnesses asked if their grand jury testimony differed from their trial testimony. Far from doing what he could have done to make out a showing of particularized need, petitioner apparently proceeded on the premise that, once it was shown that the government's witnesses had testified before a grand jury, there was an automatic right to disclosure of that testimony. This, we submit, is not the rule of law which this Court has approved.

B. This Court has consistently adhered to the view that there are important public policies which make it "indispensable" to maintain the secrecy of grand jury proceedings (*United States* v. *Johnson*, 319 U.S. 503, 513; see, also, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233) and that this secrecy is not to be broken except when there is a showing of "compelling necessity" in specific "instances" which "must be shown with particularity," *United States* v. *Procter & Gamble*, 356 U.S. 677, 682. As most recently stated in *Pittsburgh Plate Glass Co*, v. *United States*, 360 U.S. 395, 400, the "burden * * * is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy." As the Court further stated, there is no "absolute right" to disclosure (p. 401); the matter is one committed to the "discretion" of the trial judge, who is to determine whether "the ends of justice require" disclosure (p. 400).

We do not contend that a defendant must establish inconsistency between trial and grand jury testimony as a prerequisite to obtaining disclosure of the latter. See *Pittsburgh Plate Glass* case, *supra,* at 401. We do believe, however, that the defense must do what is available to it in the discharge of its "burden" to show a "particularized need," and that accordingly the petitioner in this case was obliged to interrogate the government's witnesses with a view to ascertaining (1) whether they had testified before the grand jury as to the particular episodes which became significant at the trial and (2) whether, if so, they claimed that their grand jury testimony was the same as their trial testimony. This was not done.

C. We disagree, moreover, with petitioner's contention that the various demands which it made in the trial court were appropriately limited. They were not demands for grand jury testimony bearing on those particular matters which became important or crucial at the trial; rather, they were demands (with one exception) for all testimony given before all grand juries "in which the witness gave testimony related to the subject matter of his testimony in this proceeding" (R. 118; see, to similar effect, R. 132, 448, 487).

In relation to the witness Gardner, the defense ultimately modified its broad demand so as to restrict its request to grand jury testimony involving two significant episodes (R. 677–678). It is to be noted in this connection, however, that Gardner did not testify before the grand jury in this proceeding but

before a grand jury which returned an indictment in another case (see R. 679). It is true that petitioner became a defendant (along with numerous others) in that case as well, and that the charge there was a conspiracy to violate Section 9(h). But the trial of the conspiracy case had not begun at the time that the instant case was in progress (the conspiracy case did not in fact come to trial until November 1959), and it is certainly a relevant factor from the standpoint of the district court's exercise of discretion that petitioner's counsel (who was also of counsel in the conspiracy case) was seeking to breach the secrecy of grand jury testimony presented in a proceeding which was still in its pretrial stages. Compare *United States* v. *Procter & Gamble, supra.*

D. There is a further significant factor to consider in determining whether the trial court abused its discretion—namely, whether there was a manifest need for the disclosure of grand jury testimony in light of the fact that the defense had already obtained, for impeachment purposes, access to numerous statements of the government's witnesses (see R. 141–145, 252–253 (Eckert); R. 656–658 (Gardner); R. 780–782 (Mason)) produced pursuant to 18 U.S.C. 3500, and to transcripts of other proceedings at which the witnesses in question had testified (see *e.g.*, R. 131–133, 155–156 (Eckert); R. 498–499 (Gardner); R. 687–689 (Mason)), including the transcript of this petitioner's first trial.[28] The short of it is that the three government witnesses were on

[28] The record is replete with references to the testimony of these witnesses at the first trial.

record, over a period of years, as to the matters on which the defense sought to impeach them. Their statements and testimony on other occasions did not show material inconsistencies, but merely the kind of variation which one might expect of a witness being called upon to recall many details. The Court of Appeals, following a full and careful appraisal of the record, concluded (R. 927–928):

> * * * In view of prior statements of these witnesses made available to the defense, in which there appeared no suggestion of material inconsistency, it is unlikely that their statements to the grand jury occurring at a time between the giving of such statements and consistent statements upon trial would produce impeaching material. Appellant shows inaccuracies in the testimony of the witnesses (i.e. Gardner thought he had testified in another case the prior week but actually it was two weeks earlier; Eckert had testified on seven previous occasions against Mine-Mill but his testimony as to details was not precisely the same on each occasion; Gardner's evidence at trial was not shown on the reports which he made to the F.B.I.; Mason stated to the F.B.I. that he was "unable to enlarge" on information about appellant, but at trial gave other specific information); these inaccuracies might well give rise to argument concerning the witnesses' memories and powers of observation which were available to the defense from the materials produced by the government. They do not demonstrate a reason for believing that the witnesses' testimony was biased or im-

peachable on material fact. They do not compel the conclusion that the testimony before the grand jury requires further investigation.

We submit that, in view of the liberal production of materials accorded the defense, the court below was warranted in concluding that it was within the discretion of the trial court to refrain from granting access to a mass of grand jury minutes in this and other proceedings.

E. Petitioner argues that, whether or not the defense was entitled to direct production of the minutes which it sought, the trial judge, at a minimum, was required to act favorably on petitioner's alternative request, *i.e.*, that the judge examine the minutes *in camera* and then direct production to the defense in the event that his examination revealed inconsistencies. It is apparently petitioner's view (see Br. 40) that the trial judge must undertake a study of the grand jury testimony of a prosecution witness whenever the defense requests it. Petitioner also suggests that this is the rule which has been adopted in the Second Circuit.

We doubt that the Second Circuit has gone so far as to impose an automatic duty upon the district court to delve into the grand jury proceedings whenever the defense requests it. Doubtless, its practice has gone beyond that of the other circuits. Nonetheless, it has indicated on repeated occasions that the district judge does have a measure of discretion in the matter. *United States* v. *Perlman*, 247 Fed. 158, 161 (the "right [of the court to inspect grand jury minutes] should be sparingly exercised"); *United States*

v. *Alper,* 156 F. 2d 222, 226; ("Whether the power should be exercised lies, like other matters pertaining to the conduct of a trial, within the court's discretion. * * * If the witness's grand jury testimony is very lengthy, it would be an intolerable burden and would unduly delay the trial to require the judge to go through it on the mere chance that some inconsistency favorable to the accused might be found. * * * The duty * * * is particularly one about which it would be unsafe to generalize."); *United States* v. *McKeever,* 271 F. 2d 669, 672 (the defense is entitled to request *in camera* inspection "if there appears to be some basis for supposing that his grand jury testimony may be at variance with his trial testimony").

In all events, the concept of an automatic requirement is incompatible with this Court's clear statement that the burden of showing a particularized need is on the defense and that the determination whether this burden has been met is one for the informed discretion of the district judge. *Pittsburgh Plate Glass Co.* case, *supra,* 360 U.S. at 400. To depart from this precept and to require the trial judges of the federal courts to examine all of the grand jury testimony of the prosecution's witnesses in every instance where that is requested by the defense in the bare hope that something might turn up would impose upon district judges, whose energies are already heavily taxed, a most onerous burden. To go through extensive transcripts in other proceedings, to study and absorb the testimony fully and to attempt to evaluate the possible significance of variations or nuances—this obviously would impose a most demanding task. If this had to

be done regularly and automatically by the presiding judge, it could not fail to cause constant and time-consuming interruptions in the conduct of criminal trials. The matter is accordingly one of considerable moment, quite apart from the merits of this case. We urge the Court that, whatever it may conclude on the question of whether there was an abuse of discretion on the particular facts of this case, it is important to the expeditious administration of justice in the trial courts that the district judges retain a broad measure of discretion in matters of this kind.[29]

VIII

THE MOTIONS FOR A NEW TRIAL WERE PROPERLY DENIED

In Nos. 3 and 71, petitioner challenges the trial court's rulings denying two successive motions for a new trial, one filed while the main case was pending on appeal to the Court of Appeals (R. (3) 2–6), the other filed after the conviction had been affirmed by the Tenth Circuit (R. (71) 2–3). Both motions were based on alleged newly discovered evidence and both relate to evidence that the witness Gardner had made inconsistent statements on various matters on other occasions.

A. *The First Motion for a New Trial.*—The principal basis for the first motion for a new trial is that Gardner testified, in the course of another case

[29] Of course, for the reasons previously stated under points A–D, we do not believe that there was an abuse of discretion here in denying either of petitioner's requests, *i.e.*, the request for direct production to the defense or the request for preliminary examination by the court.

(*United States* v. *West, et al.*),[30] that he had never been in the armed forces. Following the conclusion of *West*, the defense counsel in that case ascertained that Gardner had been in the armed forces. See the Statement, *supra*, pp. 24–25. On that basis, the *West* defendants moved for a new trial.

At a hearing held in the *West* case (see *United States* v. *West, et al.*, 170 F. Supp. 200 (N. D. Ohio)), it was shown that Gardner had enlisted in the Army in 1922, at the age of 15; that he concluded this enlistment in 1925; and that he reenlisted in January 1926, deserting several months later. Gardner testified at the post-trial hearing in the *West* case that during World War II he had consulted with attorneys (one of whom was an attorney for defendants in the *West* case) as to getting his old military record "cleared up," and that he had been advised to "forget it" (170 F. Supp. at 205). He further testified that he interpreted the question propounded at the *West* trial (as to whether he had been in the armed forces) as a question directed to the matter of military service during World War II. The court credited this explanation, noting that it was "not likely that Gardner would attempt to conceal and falsely testify to something which he believed was within [the] knowledge" of defense counsel (170 F. Supp. at 206).[31]

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[30] The *West* defendants have petitioned this Court for a writ of certiorari (Nos. 93, 73 Misc. and 74 Misc.), raising, *inter alia*, the question whether a motion for a new trial was properly denied in that case. These petitions are still pending.

[31] The court also made a specific finding that there was no evidence to show that the government's attorneys had any knowledge of Gardner's military service when they were trying the *West* case. 170 F. Supp. at 207.

The matter of granting a new trial on the basis of allegations of newly discovered evidence is one as to which the trial court has broad discretion.[32] There are several grounds for concluding that there was no abuse of discretion here. It is to be noted, in the first place, that the matter of Gardner's military history was not a material issue in the trial of the instant case or in the trial of the *West* case; indeed, in this trial, no question at all was addressed to Gardner on that subject. It is well settled that evidence which is merely cumulative or impeaching will not ordinarily serve as the basis for grant of a new trial.[33] Here, the relevancy of the new evidence is not only restricted in the sense that it could be useful for impeachment only; there is the added consideration that petitioner is now seeking to impeach the witness by exploration of a collateral matter which he never even sought to investigate at the trial. Finally, there is the persuasive consideration that the trial judge in the *West* case—the case in which the untruthful or inaccurate testimony was given—has conducted an extensive hearing and has concluded that such testi-

[32] See *Weiss* v. *United States*, 122 F. 2d 675 (C.A. 5), certiorari denied, 314 U.S. 687; *United States* v. *On Lee*, 210 F. 2d 722 (C.A. 2); *Winer* v. *United States*, 228 F. 2d 944 (C.A. 6); *Casey* v. *United States*, 220 F. 2d 752 (C.A. 9); *Long* v. *United States*, 139 F. 2d 652 (C.A. 10); *United States* v. *Peller*, 151 F. Supp. 242 (S.D.N.Y.); *United States* v. *Hiss*, 107 F. Supp. 128 (S.D.N.Y.).

[33] See *Mesarosh* v. *United States*, 352 U.S. 1, 9; *United States* v. *Johnson*, 327 U.S. 106; *Murphy* v. *United States*, 198 F. 2d 87 (C.A.D.C.); *United States* v. *On Lee*, *supra*; *United States* v. *Rutkin*, 208 F. 2d 647 (C.A. 3); *Pitts* v. *United States*, 263 F. 2d 808 (C.A. 9).

mony was not given with an intent to falsify. In these circumstances, we submit that there is no sound basis for concluding that the availability of the new evidence would be likely to produce a different result if the instant case were re-tried. Cf. *Berry* v. *State of Georgia*, 10 Ga. 511; *Larrison* v. *United States*, 24 F. 2d 82 (C.A. 7).

Petitioner's reliance on *Mesarosh* v. *United States*, 352 U.S. 1, and *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, is misplaced. *Mesarosh* involved a prosecution witness at a federal trial who, after his testimony in the principal case, commenced to give extravagantly improbable testimony in other cases and proceedings (352 U.S. at 4–8). The statements were in large part *material to the proceedings* in which they were made. Similarly, the *Communist Party* case involved a situation in which allegations had been made of perjury on the part of three witnesses "in other cases on subject matter *substantially like that of their testimony in the present proceedings*" (351 U.S. at 124, emphasis added). *Napue* v. *Illinois*, 360 U.S. 264, on which petitioner also relies, is not in point, for that case involved affirmative concealment of impeaching evidence by the prosecution. Here, it affirmatively appears that the government attorneys had no knowledge of petitioner's military service until after the *West* trial and the instant trial were concluded, and that, when the matter was first raised, the Government fully cooperated in ascertaining the facts.[24]

[24] Petitioner's first motion for a new trial also raised contentions that Gardner, on various occasions, had been incon-

B. *The Second Motion for a New Trial.*—The evidence advanced in support of the second motion concerned Gardner's marital history. In 1955, he gave the F.B.I. a statement (R. (71) 8–9) that he married his present wife in 1945, but had not been divorced from his first wife until 1946. In January 1958, Gardner testified, at the *West* trial, that he was divorced in the middle of 1945 and remarried "very shortly" after his divorce (R. (71) 12). At the trial in this case, he testified that he was divorced and remarried in 1946. At the hearing in *West*, as set out in the Statement, *supra*, pp. 29–30, Gardner explained that his second marriage was a common law one, and that, when he testified in this (the *Travis*) case in Denver, he decided that he had made a mistake in the *West* trial, and that 1946 was correct. He further testified at the *West* hearing that he subsequently had taken the matter up with his wife and that they had concluded it was 1945, after all.

As pointed out by the district judge who conducted the post-trial hearing in *West* (170 F. Supp. at 211), "Gardner's marriage to his present wife was a common law marriage and the relationship actually commenced shortly before the divorce from his first wife became final, on July 1, 1946, and he has lived with and supported his common law wife ever since." A person more learned in law than Mr. Gardner, a layman, might well have experienced difficulty in fixing the "effective" date of the common law marriage.

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sistent as to the date of his birth and as to his employment history during the 1920's. We have referred to these matters in the Statement, *supra*, pp. 25–26. Since petitioner has not argued these points in his main brief, we shall rely, for present purposes, upon our statement of the relevant facts.

It seems apparent, for the reasons already indicated in our discussion of the first motion for a new trial, that the discrepancy as to the date of Gardner's remarriage—a matter wholly extraneous to the issues in this case and the *West* case—could not conceivably warrant a new trial. We note additionally that petitioner knew, during the course of this trial, that Gardner had given two dates (1945 and 1946) as the date of his second marriage and that petitioner, indeed, exploited this discrepancy to the point of stating, in the jury's presence, that if the statement in the F.B.I. report was true Gardner had committed bigamy (see R. 548). It is rather astonishing to suggest that this case should now be re-tried to afford petitioner an opportunity to point out that, after the conclusion of this trial, Gardner continued to be unsure as to whether the correct date of his common law marriage was 1945 or 1946.

CONCLUSION

The judgments of the Court of Appeals should be affirmed.

Respectfully submitted.

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